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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re

SAMUEL LEWIS,

on

Habeas Corpus.

B229705

(Los Angeles County
Super. Ct. No. BH006997)

ORIGINAL PROCEEDING; petition for writ of habeas corpus.

Peter P. Espinoza, Judge. Petition granted.

Law Office of Charles Carbone and Charles F.A. Carbone for Petitioner.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General,
Julie A. Malone and Jennifer O. Cano, Deputy Attorneys General, for Respondent.

Samuel Lewis (petitioner) challenges an order by the superior court finding that some evidence supports the Board of Parole Hearings (Board) determination that he is unsuitable for parole. According to petitioner, no evidence in the record supports the determination that he poses a current and unreasonable risk of danger to public safety if released from prison. We agree and grant the petition for writ of habeas corpus.

BACKGROUND

I. The Commitment Offense

On the day of the offense, petitioner, who was 18 years old at the time, and Marcus Viagas (Viagas) were about to engage in a physical fight. Viagas's older brother intervened and challenged petitioner to fight instead. The older brother was much larger than petitioner, so petitioner left the scene. Petitioner returned with several friends, all of whom were members of the Van Ness Gangsters, a clique of the Bloods gang. Petitioner was not a member of the Bloods gang at the time, although he wanted to join the gang. Petitioner and his friends yelled at Viagas and then left the scene. Petitioner returned home.

Later that evening, three members of the Bloods gang (Leon, Surgeon, and Randy) drove to petitioner's home and picked him up. As they were driving, Leon pulled a sawed-off shotgun from under his seat and handed it to petitioner. Leon asked petitioner whether petitioner knew how to operate the shotgun. Petitioner answered in the negative, and Leon proceeded to show petitioner how to load and fire the shotgun. The car parked a short distance from Viagas's home. Randy stayed near the car while petitioner, Surgeon, and Leon began walking toward Viagas's home. Leon told petitioner that "they were all on the porch" in front of Viagas's home and petitioner simply had to "go and shoot." According to petitioner, as the group approached Viagas's home, he "thought about stopping and getting out of it, but at the same time [he] didn't know how, or what to say, or what [he] should tell [Leon]." Leon was older than petitioner, and petitioner wanted to impress him.

At one point, Leon and Surgeon stopped walking with petitioner and petitioner approached the victim's house alone. Petitioner saw several people on the porch and

observed that they did not notice his presence. Petitioner approached the porch, mounted the first step, closed his eyes, and fired a round. Petitioner was so surprised by the tremendous amount of noise emanating from the shotgun that he almost dropped the shotgun after firing the first round. Petitioner held on to shotgun, however, and fired an additional three to five rounds depending on various reports. The design of the shotgun required petitioner to pause and pump the shotgun between each round. As petitioner was shooting, he did not look to see who he was shooting at, or if he had hit anybody. Petitioner then ran from the scene.

Petitioner encountered Leon several houses away and handed Leon the shotgun. Together, they ran to Leon's home, and sat on Leon's porch for 10 to 15 minutes. Petitioner felt scared and was shaking. Leon and petitioner drove back to petitioner's home. Police officers arrested them shortly thereafter.

As a result of petitioner's actions, a 17-year-old woman died, another woman received a gunshot wound in the hand, and a man received a gunshot wound in the shoulder. Viagas was unharmed.

Petitioner pled guilty to second degree murder. The superior court sentenced petitioner to 15 years to life in prison. The Department of Corrections and Rehabilitation received petitioner on January 4, 1989. Petitioner became eligible for parole on March 21, 1998.

II. The February 1, 2010 Suitability Hearing

A. Insight into the Commitment Offense

During the parole suitability hearing, the Board spent a considerable amount of time exploring what petitioner was thinking at the time of the offense. When asked by the Board whether petitioner considered the damage that a shotgun could cause, petitioner replied that he "never thought of how much damage that shotgun would do." Instead, petitioner was focused on earning the respect of Leon.

When asked by the Board why petitioner simply did not turn and leave the scene after the first shot, petitioner replied: "I can't answer that question, sir. I don't know. I wish I would have." Petitioner went on to explain: "I wanted to make sure that Leon and

them, . . . knew that I really was serious about being with them. That's the only answer I can give you, Commissioner []. I look back and I see at least seven times in that day where I could have stopped this from happening, seven times. In between those shots is a time. When me and Marcus first started staring, I didn't have to [go] back and get anybody. I didn't even have to stop the car. When we came back the second time[,] I didn't have to come back the second time. When Leon and them came to my mother's house[,] I didn't have to get in the car."

After this explanation, the Board continued to question petitioner about why he did not stop shooting after firing the first round. The Board stated: "[I]f you don't have an answer, . . . [we'll] respect that. But if you do have an answer, we need to hear it." Petitioner replied: "I don't have an answer," but then immediately clarified: "I would say I didn't want [Leon] to think that I wasn't serious about being in the gang. . . . It was that important to me to be accepted by those guys and be in that gang at that time."

When asked how petitioner currently felt about his actions, petitioner replied that he felt "horrible" and that he thought about the shooting on an almost daily basis. Petitioner explained that he dealt with his feelings of remorse and guilt by focusing on his spiritual faith and helping children in the community avoid the same mistakes that he made. Petitioner further explained that after years of self-reflection in prison, he came to realize that his desire to be accepted by older members of the Bloods gang stemmed, in part, from the loss he suffered as a seven year old when his father abandoned him. His father's departure left a "hole in his life" and he tried to fill this hole by gaining respect from older men, including Leon and other Bloods members. Petitioner stated that he now understood that people feared, rather than respected, gang members and that petitioner should have turned to his mother for support and guidance rather than gang members. Petitioner emphasized that the "brotherhood" offered by the gang lifestyle was illusory, and that he had long since renounced any involvement with the Bloods gang.

B. Preconviction Conduct

Prior to the commitment offense, petitioner was arrested three times: (1) In January 1987, he was arrested once for grand theft auto. The prosecution dismissed the

charges, however, when petitioner proved that he owned the car by producing the pink slip and bill of sale. (2) In March 1987, petitioner was arrested for carrying a concealed weapon. At the time, petitioner was not involved in gangs, but had to walk through two gang neighborhoods in order to visit his girlfriend at her house. Petitioner explained that he carried a .25 automatic pistol for protection from these gangs. (3) In February 1988, petitioner was again arrested for carrying a concealed weapon in his vehicle. The prosecution dismissed the charge for insufficient evidence.

C. Post-conviction Conduct

During his more than two decades in prison, petitioner has participated in numerous educational and self-help programs, such as the Seeking Peaceful Solutions program, Criminal and Gang Members Anonymous, Toast Masters, Inside Out Dad, Cage Your Rage, and Fathers Behind Bars. Petitioner has also regularly participated in Alcoholics Anonymous and Narcotics Anonymous. Although nothing in the record suggests that petitioner suffers from a substance abuse problem, petitioner noted that he found the programs' steps helpful in understanding the importance of faith and personal morality. In addition to the aforementioned programs, petitioner has also earned two Associate in Arts (A.A.) degrees and is an ongoing participant in Coastline Community College courses.

Petitioner has also devoted a great deal of time to community service. Specifically, petitioner has been actively involved in the "We Care Program" and the "Alternative to Violence Project," and has received numerous laudatory citations for his participation in the programs. Both programs bring at-risk children to the Soledad Training Facility and give inmates the opportunity to speak about their experiences and explain how best to avoid a path that leads to prison. Petitioner emphasized that "[t]he person [he is] today is a person that is committed to . . . changing the culture of gangs in [his] neighborhood, [and] changing the culture of violence."

Petitioner's record contained three "very supportive" citations from correctional officers' dated December 2008, February 2009, and April 2009. Each citation discussed petitioner's "readiness for parole," "positive attitude," and "work ethic." Petitioner's

record also contained “exceptional work reports” from petitioner’s supervisor at the prison’s culinary station.

While incarcerated, petitioner has incurred seven “128” counseling chronos and seven “115” disciplinary violations. The last 128 violation occurred in 1994 for being out of bounds, and the last 115 violation occurred in 1999 for refusing to comply with a direct order.

D. Psychological Evaluations and Parole Plans

A psychological evaluation prepared in May 2008 by one clinician reported the following: Petitioner suffers from a personality disorder (not otherwise specified) with some antisocial traits. Petitioner scored in the “high end of the low range” for psychopathy, the “low to low moderate” range for risk of future violence, the “low” range for general recidivism, and the “low to low moderate range” for overall propensity toward violence.

A second psychological evaluation, prepared in August 2008 by another clinician, reported the following: Petitioner does not demonstrate any traits for mental or emotional problems, does not reveal any antisocial characteristics, and does not currently display any criminal thinking styles. The clinician noted that petitioner’s “prognosis for a successful adjustment in the community is excellent.”

If paroled, petitioner plans to live with his older sister, who owns a three bedroom house. Petitioner is married and hopes to bring his wife to live with him and his sister. Petitioner has a current job offer with a termite company that has committed to paying him \$15 an hour for a carpenter apprentice position. Multiple support letters indicate that petitioner has secured spots in various transitional homes if needed. Additionally, petitioner has constructed a relapse prevention plan for staying out of criminal activity.

III. The Board’s Decision

After some deliberation, the Board found that petitioner’s release from prison would pose an unreasonable risk of danger to public safety and issued a three-year denial of parole. The presiding commissioner noted that denying petitioner parole was a “difficult, difficult decision.”

Nonetheless, the Board determined that petitioner was unsuitable for parole for the following reasons: First, the Board found that the commitment offense was carried out in a dispassionate and calculated manner, demonstrated an exceptionally callous disregard for human suffering, and petitioner's motive was trivial in relation to the gravity of the offense. Second, the Board found that petitioner lacked insight into the reasons why he committed the offense and minimized his culpability. The presiding commissioner noted:

“We asked you many questions to try to see if you had insight. And one minute I felt you did, and then Commissioner [] asked you, why did you do it, and you said I don't know. Sir, you've been in prison for a long time. You need to know. You need to know why would you, why would you fire a shotgun into a crowd of teenagers with your eyes closed. Because somebody disrespected you and you wanted, you wanted to gain respect from this group of people that frankly, as was proven later on, didn't really care about you at all.”

The Board stated that in order to demonstrate suitability for parole in a future hearing, petitioner could not “afford to minimize” his culpability and had “to be able to talk about why [he] used that pump shotgun and fired numerous rounds.”

On the positive side, the Board noted that petitioner's institutional adjustment had been “really nothing short of exceptional.” Additionally, the Board found that petitioner's remorse for the commitment offense was genuine, and that both psychological evaluations were favorable.

Petitioner filed a petition for writ of habeas corpus with the superior court challenging the Board's finding of unsuitability for parole. The superior court concluded that there was some evidence in the record to support the Board's finding that petitioner posed an unreasonable risk to public safety if released, and accordingly denied the petition.

DISCUSSION

I. Legal Framework

“The granting of parole is an essential part of our criminal justice system and is intended to assist those convicted of crime to integrate into society as constructive individuals *as soon as possible* and alleviate the cost of maintaining them in custodial

facilities. [Citations.] Release on parole is said to be the rule, rather than the exception [citations] and the Board is required to set a release date unless it determines that ‘the gravity of the current convicted offense . . . is such that consideration of the public safety requires a more lengthy period of incarceration’ [Citation.]” (*In re Vasquez* (2009) 170 Cal.App.4th 370, 379-380.)

“In making the suitability determination, the Board . . . must consider ‘[a]ll relevant, reliable information’ (Cal. Code Regs., tit. 15, § 2402, subd. (b); hereafter § 2402), such as the nature of the commitment offense including behavior before, during, and after the crime; the prisoner’s social history; mental state; criminal record; attitude towards the crime; and parole plans (§ 2402, subd. (b)). The circumstances that tend to show unsuitability for parole include that the inmate: (1) committed the offense in a particularly heinous, atrocious, or cruel manner; (2) possesses a previous record of violence; (3) has an unstable social history; [fn. omitted] (4) has previously sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison. (§ 2402, subd. (c).) A factor that alone might not establish unsuitability for parole may still contribute to a finding of unsuitability. (§ 2402, subd. (b).)” (*In re Twinn* (2010) 190 Cal.App.4th 447, 461.)

In contrast, “[c]ircumstances tending to show *suitability* for parole include that the inmate (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his life, especially if the stress had built over a long period of time; (5) committed the criminal offense as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law upon release. (§ 2402, subd. (d).)” (*In re Twinn, supra*, 190 Cal. App. 4th at pp. 461-462.)

In reviewing a Board's suitability determination, an appellate court looks to "whether some evidence supports the *decision* of the Board [] that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*In re Lawrence* (2008) 44 Cal.4th 1181, 1212 (*Lawrence*)). Reviewing courts must keep in mind that "[i]n light of the constitutional liberty interest at stake, judicial review must be sufficiently robust to reveal and remedy any evident deprivation of constitutional rights." (*Id.* at p. 1211, quoting *In re Rosenkrantz* (2002) 29 Cal.4th 616, 664.) "If simply pointing to the existence of an unsuitability factor and then acknowledging the existence of suitability factors were sufficient to establish that a parole decision was not arbitrary, and that it was supported by 'some evidence,' a reviewing court would be forced to affirm any denial-of-parole decision linked to the mere existence of certain facts in the record, even if those facts have no bearing on the paramount statutory inquiry. Such a standard, because it would leave potentially arbitrary decisions of the Board . . . intact, would be incompatible with our recognition that an inmate's right to due process 'cannot exist in any practical sense without a remedy against its abrogation.'" (*Lawrence*, at p. 1211.)

II. Application

Here, the Board based its decision to deny parole on two grounds: (1) the nature of the commitment offense; and (2) petitioner's lack of insight into his reasons for committing the offense.

We are absolutely in agreement with the Board that petitioner committed the offense in a particularly heinous, atrocious, and cruel manner. There is no dispute that petitioner approached a group of innocent individuals and opened fire on them from a short distance with a weapon that was capable of causing severe and devastating injury. And we also agree with the Board that petitioner's motive of wanting to impress members of a street gang was trivial in relation to the tremendous gravity of the offense.

Our agreement with the Board's characterization of the commitment offense, however, does not end the inquiry into whether petitioner *currently* poses an unreasonable risk to public safety if released. "Rather, the relevant inquiry is whether the

circumstances of the commitment offense, when considered in light of other facts in the record, are such that they continue to be predictive of *current* dangerousness many years after commission of the offense. This inquiry is, by necessity and by statutory mandate, an individualized one, and cannot be undertaken simply by examining the circumstances of the crime in isolation, without consideration of the passage of time or the attendant changes in the inmate's psychological or mental attitude.” (*Lawrence, supra*, 44 Cal.4th at p. 1221.) “[A]lthough the Board . . . may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of current dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her *current* demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety.” (*Id.* at p. 1214.)

Petitioner committed the offense when he was 18 years old, and has now spent more than 20 years engaging in the rehabilitative process. As noted by the Board itself, petitioner's institutional adjustment has been “really nothing short of exceptional,” as evidenced by petitioner's commitment to higher education and self-improvement courses, and active participation in community programs designed to keep young people out of prison. Additionally, petitioner has gone more than a decade without incurring a disciplinary violation and has received the support of correctional officers who have observed his readiness for parole, positive attitude, and committed work ethic. Petitioner's most recent psychological evaluation noted that petitioner does not demonstrate any traits for mental or emotional problems, does not reveal any antisocial characteristics, and does not currently display any criminal thinking styles. The evaluation concluded that petitioner's “prognosis for a successful adjustment in the community is excellent.”

Thus, in light of petitioner's tremendous gains while incarcerated, his lengthy period of positive rehabilitation, and his overall positive psychological evaluation, the

immutable characteristics of the commitment offense committed two decades ago, however horrific, may no longer indicate a current risk of danger to society. (*Lawrence, supra*, 44 Cal.4th at p. 1211.)

We now turn to the Board's second stated reason for denying parole, specifically that petitioner lacked insight into the reasons why he committed the offense.

"[E]xpressions of insight and remorse will vary from prisoner to prisoner and . . . there is no special formula for a prisoner to articulate in order to communicate that he or she has gained insight into, and formed a commitment to ending, a previous pattern of violent behavior." (*Shaputis, supra*, 44 Cal.4th at p. 1260, fn. 18.)

Here, petitioner explained to the Board that he committed the crime in order to impress and gain acceptance from Leon and other members of the Bloods gang. Petitioner explained that his desire to please members of the Bloods gang stemmed, in part, from his father's abandonment at an early age. As petitioner described it, his father's departure left a "hole in his life" and petitioner tried to fill this hole by gaining respect from older men, including Leon and other Bloods members. When asked whether he considered the amount of injury he could cause by firing a shotgun at close range, petitioner was frank and explained that his focus was on gaining Leon's approval and not on the injury he would cause to the victims. As we see it, petitioner's explanation as to why he committed the crime was clear, thoughtful, and genuine. We recognize that when pressed to give reasons above and beyond what he had already identified, petitioner answered "I don't know." When viewed in context of what petitioner said during the entire hearing, however, this response did not demonstrate a lack of insight. Rather, it was an honest response by someone who had already explained fully the reasons for his actions and could no longer summon any additional responses.

In sum, the record before the Board at the February 10, 2010 hearing is devoid of any evidence supporting a finding that petitioner's release would pose an unreasonable risk to public safety. Petitioner committed an undoubtedly grievous crime over 20 years ago. However, the undisputed evidence demonstrates petitioner has since gained insight into the reasons why he committed the crime, changed his attitude toward gangs,

remained free of serious discipline in prison since 1999, expressed genuine remorse for the crime he committed, furthered his education and vocational skills, committed himself to community service, and developed realistic parole plans. Applying the some evidence standard to the record before us, we conclude the record fails to support the Board's conclusion that petitioner remains a current danger to public safety.

DISPOSITION

The petition for a writ of habeas corpus is granted. The superior court's order of October 4, 2010, denying petitioner's writ of habeas corpus, and the Board's February 1, 2010 decision finding petitioner unsuitable for parole, are hereby vacated. The Board is directed to conduct a new parole suitability hearing within 90 days of the issuance of the remittitur in this matter in accordance with due process of law and consistent with *In re Prather* (2010) 50 Cal.4th 238. Pursuant to California Rules of Court, rule 8.387(b)(3)(A), this opinion shall be final as to this court within five days after it is filed.

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_____, J.
CHAVEZ

I concur:

_____, J.
DOI TODD

BOREN, PJ. - Dissenting

I dissent.

I believe some evidence in the record supports the determination of the Board of Parole Hearings (Board) that Samuel Lewis (petitioner) remains a current and unreasonable risk of danger to public safety if released from prison. I would deny the petition and uphold the Board's finding that petitioner is unsuitable for parole.

Petitioner, age 18 years old at the time of his offense, was affiliated with members of the Van Ness Gangsters, a clique of the Bloods gang. Egged on by members of his gang, petitioner went to the house of a targeted person, with whom he previously had an altercation. Carrying a loaded shotgun, petitioner walked to the porch where a number of unarmed and unsuspecting people were gathered. He fired numerous times, killing a young woman of 17 years and wounding two other persons. The person with whom he had had the earlier altercation was not among the victims. Petitioner pled guilty to second degree murder. The Department of Corrections and Rehabilitation received him in January 1989.

Prior to the commitment offense, appellant had been arrested on two separate occasions for carrying a concealed firearm. He had also been arrested for grand theft auto. He was convicted of none of these three offenses.

In prison now for slightly more than 22 years, petitioner has participated successfully in several educational and self-help programs. He has earned two Associate in Arts (AA) degrees. He has also spent considerable time participating in community service programs that are available in prison. Because of his participation, he has received laudatory citations. Although during his first decade in prison he accumulated 14 disciplinary violations, his last violation occurred in 1999 for refusing to comply with a direct order.

Petitioner's most recent psychological evaluations categorize him as a low to moderate risk for "psychopathy," future violence, and recidivism. His plans to live in the home of his sister, with his wife, and to work for a termite company as a carpenter apprentice appear reasonably optimistic.

The Board assessed his institutional adjustment as "really nothing short of exceptional." The Board also found that his remorse for the commitment offense was genuine and his psychological evaluations favorable. Nonetheless the Board found petitioner unsuitable for parole. The superior court found that there was "some evidence" in the record to support that finding. I agree.

The Board gave two reasons for finding petitioner unsuitable for parole: The first was based on the nature of the commitment offense. The second was the Board's belief that petitioner lacked insight into his commission of the crimes. The Board found that petitioner carried out his crimes in a dispassionate and calculated manner and demonstrated an exceptionally callous disregard for human suffering. The Board put many questions to petitioner to ascertain why he would "fire a shotgun into a crowd of teenagers with [his] eyes closed." It concluded that he had committed the crime for the trivial reason of wanting respect from the gang. It also concluded that he continued to minimize his own personal responsibility for the crime, attempting to lay the bulk of the blame and guilt instead on the peer pressure of growing up in a gang environment.

Citing *In re Lawrence* (2008) 44 Cal.4th 1181, 1211, and petitioner's "tremendous gains while incarcerated, his lengthy period of positive rehabilitation, and his overall positive psychological evaluation," the majority concludes that the commitment offense, one that is "horrific, may no longer indicate a current risk of danger to society." This conclusion is a reasonable one. But I do not agree with the further conclusion that no evidence supports the Board's determinations that petitioner lacks insight into his crimes and that he currently remains dangerous and unsuitable for parole.

The appellate court should uphold a denial of parole where an inmate lacks insight into his crime and its originating causes and where the offense is an aggravated one. (See *In re Shaputis* (2008) 44 Cal.4th 1241, 1258-1261.)

The offense was clearly an aggravated one. Petitioner fired a shotgun five to six times into a crowd of unarmed and unsuspecting people. Despite claiming that he wanted to stop after firing the first shot and did not see who he was shooting at, petitioner admitted that he had wielded a pump shot gun and pumped it after each shot. Despite the self-serving statement that he intended to shoot no one, he killed one young woman and wounded two other persons.

The Board, who collectively reviewed petitioner's record and personally heard and listened to him during the hearing, properly recognized that petitioner minimized his responsibility for wounding and killing other persons. His explanation that gang peer pressure made him keep shooting into the crowd was a hollow one, portraying himself as an unwilling and reluctant participant. Petitioner's statement that he did not see who he was shooting at and did not intend to shoot anyone is dubious because petitioner had to pump load each round into the chamber of the shotgun in order to fire. The Board was entitled to conclude in light of petitioner's explanation that he lacked insight into the commitment offense, had not taken full responsibility for his crime, and remained a danger to public safety. (Compare *In re Shippman* (2010) 185 Cal.App.4th 446, 460; *In re Van Houten* (2004) 116 Cal.App.4th 339, 354-355; and *In re McClendon* (2003) 113 Cal.App.4th 315, 320-322.) The petition for a writ of habeas corpus should be denied.

BOREN, P.J.